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IN THE

Supreme Court of the United States

TERM, 1971

NO. 70-40

MARY DOE; Peter G. Bourne; Robert Hatcher; Lillie E. James; James Watson; Corbett Turner; Newton Long; Edward Lowder; William H. Higgins; George Violin; Patricia R. Smith; Jennie Williams; Judith Bourne; Suzanne Dunaway; Joyce Parks; Lou Ann Irion; Mary Long; J. Emmett Herndon; Samuel L. Williams; Eugene Pickett; Richard Dover; Donald Dougherty; Judith Zouch and Karen Weaver, residents of the State of Georgia; Planned Parenthood Association of Atlanta, Inc., a Georgia corporation; and Georgia Citizens for Hospital Abortion, Inc., a Georgia corporation, for and on behalf of all persons and organizations similarly situated,

Appellants,

VS.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; Lewis R. Slaton, as District Attorney of Fulton County, Georgia; and Herbert T. Jenkins, as Chief of Police of the City of Atlanta,

Appellees.

On Appeal from the United States District Court For the Northern District of Georgia

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BRIEF FOR APPELLEES

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Atlanta Division

BRIEF FOR APPELLEES

STATEMENT OF THE CASE [1]

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[1] The statement is placed out of order because the discussion of jurisdiction, which next follows, is dependent in part upon its content.

Suit challenging the entire criminal abortion law of Georgia (Criminal Code of Georgia, Title 26, Chapter 12), was brought in federal district court by twenty-six entities. No facts were established in the proceedings as to any of them. The group included "Mary Doe", purportedly a pregnant woman who had sought and been refused an abortion, nine persons described as physicians, seven as nurses, five as ministers, two as social workers, and two corporations. (A. 7-10).

"Mary Doe's" identity remains unknown except apparently to her attorney and possibly to plaintiff Bourne. (A. 63, 65). If the facts which she alleged had been proved, and assuming that no other significant but absent fact would alter the picture, her situation, by her own assertion, would be as follows:

At the time suit was instituted on April 16, 1970, (A. 1), "Mary Doe" was nine weeks pregnant with her fourth child. (A. 7-18). This was later thought instead to be thirteen to fourteen weeks, (A. 48), but the statement in this Court is that she was approximately eleven weeks pregnant at the time. (Appellant's Brief, p. 8).

She applied to Grady Memorial Hospital's abortion committee for

approval of an abortion on March 25, 1970 (A. 8), that is, when she was by her calculations between six and eight weeks pregnant (measured from January 29 or February 12). She had first gone to Grady on about March 15 or 16, when she was thus four-and-one-half to six-and-one-half weeks pregnant, and had seen two doctors, White and Butler. Their conclusions concerning abortion for "Mary Doe" are unknown, and they are not parties to this suit. (A. 63). Whether a third doctor was seen or consulted before application to the abortion committee was made, as required by Section 26-1202(3), does not appear; "Mary Doe" thought three certifications were filed. (A. 56, Interrogatory 9, and A. 64, answer to Interrogatory No. 9).

The application was denied by the committee on April 10, 1970, sixteen days later. (A. 8, 64). 2/ The basis

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2/ Her Brief erroneously states it as twenty-five days (p. 8), which fact is notable because the "delay" is given as a basis for the complaint that the statutory procedure is time-consuming. (p. 36).

given for the denial, she claims, was that she did not come within the exception of Section 26-1202(a)(1), i.e., where an abortion is necessary because "a continuation of the pregnancy would endanger [her] life . . . or would seriously and permanently injure her health. . . ." (A. 8, 18, 2). Six days thereafter, suit was filed, claiming the hospital abortion committee's denial of her application deprived her of constitutionally protected rights. (A. 1, 8).

Apparently after suit was brought, but before the hearing below on June 15, 1970, (A. 125), "Mary Doe" was examined by two other doctors, Block and Bourn, and she applied to Georgia Baptist Hospital, which presumably by its abortion committee, approved the application on May 5, 1970. (A. 63-64). 3/ Whether "Mary Doe's" baby

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3/ Thus the statement in Appellants' Brief that Dr. Bourne, one of the Appellants, was one of the doctors who proposed the abortion denied by Grady, appears to be mistaken. He is the only Appellee who is asserted to have any connection whatsoever with "Mary Doe".

was subsequently aborted pursuant to this approval, or whether instead it was born in October 1970, because of the financial barrier at Georgia Baptist Hospital (A. 64), is not known to Appellees. Appellants indicate that an abortion was not done at the private hospital or outside of Georgia. (Appellants' Brief, p. 9).

"Mary Doe" was separated from her husband at the time of her application to Grady Hospital in March, 1970, (A. 64), 4/ as reconciled in April when suit was filed (A. 7), but as separated again in mid-June at the time of the court hearing. (A. 63). Whether the mental health problem she asserted (A. 7) was related in any way to the denial of her application, particularly since there was apparently no consent from her husband (A. 56, Interrogatory 8, and A. 64, answer to Interrogatory No. 8), is not

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4/ Although she claimed she was "abandoned" then (A. 7) and during pendency of the suit. (Appellants' Brief, p. 8).

in the record.

She alleged in addition that she was a young indigent resident of Georgia 5/, was unable to care for her other three children, who were in foster or adopted homes, would be unable to care for the product of her pregnancy (A. 7), and according to her Brief in this Court, she was unemployed. (Appellants' Brief, p. 8). Nowhere is it stated in the complaint that she personally desired an abortion of the baby 6/; the facts asserted allow the conclusion that she thought she ought to submit to an abortion procedure.

"Mary Doe" brought the suit additionally as a class action (A. 6). The class which she volunteered to represent was variously described for her as: "women desiring abortions" (A. 6, line 2), "all others similarly

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5/ To qualify for aid at Grady Hospital, she would have to be a resident of either Fulton or DeKalb Counties.

6/ But see A. 18(b).

situated" to her (A. 8 ¶ 9); by the court below as "pregnant women, single or married, wishing legal abortions" (A. 71), and "pregnant women denied abortions because of the Georgia statute attacked" (A. 162).

The remaining Appellants, who were dismissed below because of lack of a justiciable controversy between them and Appellees (A. 80), here challenge that ruling. (Appellants' Brief, p. 7). As indicated earlier, none of them are related in any way to "Mary Doe" except perhaps Dr. Bourne, whose conclusion regarding abortion was apparently affirmative and was approved by the private hospital's committee. (A. 63-64). None of them present any concrete, actual situation in which their "rights", differing as they are (since the group contains both individuals and corporations, medical, social and religious personages), were or will be denied. Their attack is a general attack on the statute in all of its aspects.

Neither as a group nor as individuals do they allege any prosecution or threat thereof or arrest or harassment or collision or conflict with anyone involved in enforcement or application of the statute.

None of the physicians allege a single instance in which any of them desire to perform an abortion or counsel a woman in connection therewith, or were prohibited in any way from doing so, even by the mere existence of the law. Three of the physicians (Hatcher, Waters, and Long) are on the medical staff at Grady Hospital, in at least abortion-related services. Whether they or any of them were involved in any way in "Mary Doe's" case at that hospital is not known.

None of the psychiatrists (Bourne, Turner, Leader, and Biggers) allege a single instance in which their statutory privileged communication was or might be encroached. 7/ Whether those

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7/ Ga. Code Ann. § 38-418. "There are certain admissions and communications excluded from considerations of public policy. Among these are - . . . 5. psychiatrist and patient." Ga. Laws 1959, p. 190.

listed as psychiatrists are eligible to perform abortion procedures is at the least doubtful, and in this regard, none of the physicians are allegedly licensed to perform abortive procedures. Other than the psychiatrists and various medical program directors, only two (James and Violin) are listed as "physicians".

None of the nurses allege a single instance of abortion which they were prohibited from assisting in or a single instance in which any of them were prohibited or dissuaded from counseling pregnant women about abortion.

None of the five ministers cites a single case in which they received or expected criminal action, nor do they explain why they might not be protected by the privileged communication statute.8/

8/ Ga. Code Ann. § 38-419.1. "Every communication made by any person professing religious faith, or seeking spiritual comfort, to any . . . minister, . . . priest, . . . or rabbi, . . . by whatever name called, shall be deemed privileged. No such minister, priest, or rabbi shall disclose any communications made to him by

(continued on next page)

The social workers, too, state no positive case. The corporations advance no adversary claim whatsoever.

Moving to Appellees, it is obvious that "Mary Doe"'s real complaint was against the Grady Hospital abortion committee, which did not approve her application. She thought her case came within the exception provided in Section 26-1202(1)(a) and so, apparently, did her physician and two consultants, and those involved in the approved Georgia Baptist Hospital application. The details and explanations of the action by the Grady committee, not being party to the suit, is not illumined in the record. It may have misinterpreted the statutory exception or been completely unaware of the total health picture of "Mary Doe" in terms of her mental and physical and medical factors, even to the extent set out in her complaint below. Thus, as portrayed by the com-

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(8/ continued)
any such person professing religious faith, or seeking spiritual guidance, or be competent or compellable to testify with reference to any such communication in any court."
Ga. Laws 1951, p. 468.

plaint, the denial of approval may well have been contrary to the statute's direction.

The suit instead was directed at the Attorney General of Georgia, the District Attorney of Fulton County (in which Grady Hospital is located), and the Chief of Police of Atlanta. No factual collision appeared between any of Appellants and any of Appellees. No suits, threats, harassments, or arrests were indicated.

Despite the Attorney General's advice that he was not a proper party (A. 41-46), the court below "sufficiently connected" him with the complaint by referring to his general duties, although none of them would involve him directly in enforcing the statute attacked. The remote possibility that the Governor would call on him to prosecute an abortion case is highly theoretical. (A. 73).

Appellants erroneously "link" the Attorney General with the Grady Hospital abortion committee. (Appellants' Brief, pp. 11, 21). No such control exists. The statute relied on by Appellants as the basis for the "link" provides that the authority of the Department of Law, of which the Attorney

General is head, shall extend to "the executive branch of the Government and every department, office, institution, commission, committee, board or other agency thereof."[9] This authority does not extend to any committee or employee of Grady Hospital, which is locally controlled and funded and in no way operated by the State. The hospital, like other non-State hospitals, is not represented by the Attorney General in legal affairs.[10]

The court below referred to the Attorney General's opinions, in finding a "sufficient connection", and presumably a collision of interests. Even the published opinions, however, have no effect as law. An explanation of "opinions" is set out in Appendix A hereto. No official opinion on the currently attacked abortion law has

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9/ Ga. Laws 1943, pp. 284, 285; Ga. Laws 1966, pp. 43, 45; Ga. Code Ann. § 40-1614.

10/ See also the discussion in the Attorney General's Brief in Support of Motion to Dismiss (A. 43-46).

been requested, as to any of its aspects.

The "collision" is therefore illusory, not only with respect to the local district attorney and the local chief of police, but also as to the State attorney general.

Thus the case stands. The facts are all hypothetical. The court below assumed jurisdiction without first ascertaining that a justiciable controversy existed in fact between any of Appellants and any of Appellees. The "controversy" was tenuous and remote at best. Having assumed that a controversy would exist between some of the present parties, or other parties, at some time, the court went on with no development of clear facts and simply seized the opportunity to look at the cold statute in a two-dimemsional manner. It was unenlightened by any involvement of the statute in a specific case or by the facts which investigation and cross-examination of witnesses, as well as scrutiny of legislative history, would bring to bear.

Looking at the statute at first blush, then, the court declared those parts of it which it could not justify, in its limited inquiry, to be unmaintainable. The statute was viewed not

in context but standing alone, apart from its place in the body of the criminal law and its place in time, apart from any tested application. Then, having ignored an inquiry into its purposes and intents, the court fashioned its own explanation and superimposed it on the statute. The result was a rewritten statute with the court's goals, assumed to be the legislature's goals, aimed at.

The case stands no more concretely now than if Appellants' counsel had been permitted to draw a contrived, imagined situation, and then to litigate it. It is submitted that even a facial attack on State legislation may not thus proceed in our adversary system.

JURISDICTION

If a three-judge federal district court were properly convened, this Court's jurisdiction to review its decision is unquestioned. The jurisdictional issues raised relate first to the question of whether or not a district court had jurisdiction to consider the matter, and secondly, whether or not a three-judge court was properly convened.

A. A SUBSTANTIAL FEDERAL QUESTION HAS BEEN PRESENTED.

The fundamental issue raised in a recent rash of challenges to state abortion laws is whether or not the State, through its police power, has a legitimate interest in restricting the availability of abortions. Corrolary questions are whether or not a distinction should be made between married or unmarried females; whether or not the fetus is quick; and whether or not the State has an assertible interest in the quality of the abortion to be performed.

Based on their interpretations of Griswold v. Connecticut, 381 U.S. 479 (1956), a number of courts,

including the one below in the case sub judice, have determined that a woman's constitutional "right to privacy", encompasses a "right" to terminate a pregnancy by having the fetal development medically aborted, at least where the fetus is not yet quick. California v. Belous, 71 Cal.2d 954, 458 P.2d 194 (1969), cert. den. 397 U.S. 915 (1970); Roe v. Wade, 314 F.Supp. 1217 (N.D. Tex., 1970), jurisdiction postponed, 402 U.S.941(No. 70-18, 1971 Term); State v. Jamieson, 480 P.2d 87 (Kan. 1971); Doe v. Scott, 321 F.Supp. 1385 (N.D. Ill. 1971); Babbitz v. McCann, 310 F.Supp. 293 (E.D. Wisc. 1970), appeal dismissed 400 U.S. 1 (1970).

In brief, these decisions have been bottomed on a determination that either the state had no legally protectible interest in perpetuating the life of the unquick (or quick) fetus, or that such interest, if it existed, was inferior to that of the pregnant woman's right to terminate her pregnancy by a medical abortion. Thus, these cases provide that, insofar as a State statute attempts to regulate the reasons for which an abortion may be had, it is void for overbreadth.

These decisions do recognize that the State does have a legally

protectible interest in the quality of the abortion to be performed. See the opinion below, Doe v. Bolton, 319 F.Supp. 1048, 1055-56 (1970); United States v. Vuitch, 305 F.Supp. 1032 at 1034 (D. D.C. 1971), reversed on other grounds, 402 U.S. 62 (1971); Babbitz v. McCann, supra, 310 F.Supp. at 302.

Contrary to the above decisions, other courts have determined that the State has a legally protected interest in perpetuating a fetus' life. See Corkey v. Edwards, 322 F.Supp. 1248 (W.D. N.C. 1971); Steinberg v. Brown, 321 F.Supp. 741 (N.D. Ohio 1970); Rosen v. Louisiana, 318 F.Supp. 1217 (E.D. La. 1970). Additionally, although a federal district court determined that the federal statute of local application in the District of Columbia was void for vagueness insofar as it limited a physician's right to perform an abortion only where such action was necessary for the preservation of the woman's life or health, this Court reversed, but the decision appears to be limited to the question of whether or not the statute was void for vagueness, as it related to a married couple. United States v. Vuitch, supra, 402 U.S. 62, 70-71 (1971). Compare this with Wade v. Buchanan, 308 F.Supp. 729 (1970) judgment vacated, 401 U.S. 989 (1971).

In view of the foregoing, it seems that a substantial federal question has been presented.

B. THIS CASE IS NOT A "CASE" OR "CONTROVERSY" WITHIN THE MEANING OF ARTICLE III OF THE UNITED STATES CONSTITUTION.

Notwithstanding the existence of a federal question, a United States court cannot render advisory opinions. There must be an actual "case" or "controversy" between the parties. In determining this issue, consideration is to be given to such questions as "standing" and "ripeness".

1. The refusal of the trial court to allow Appellees' inquiries into the identity of "Mary Doe" negates its jurisdiction to consider the case.

While a pregnant female may have "standing" to challenge the constitutionality of the Georgia criminal abortion statute, when she has been denied an abortion because of it, there existed below, and there still exists, a real issue as to the actual existence of "Mary Doe." Whether she

was actually pregnant, and whether she had been refused a medical abortion because of a proper application of the statute, were among the crucial factors never determined. Appellees' attempts to discover the same were disallowed by the trial court, although Rule 26, F.R.C.P. specifically grant to respondents the right to discover such information.

In the present posture of the record, therefore, "Mary Doe" is merely a fictitious person. Thus, at the threshhold of this litigation, there is no actual controversy between Appellees and "Mary Doe". Golden v. Zwickler, 394 U.S. 108 (1969); Poe v. Ullman, 367 U.S. 497 (1961); United Public Workers of America v. Mitchell, 330 U.S. 75 (1947); Bailey v. Patterson, 369 U.S. 31 (1962).

2. The remaining Appellees lack standing to challenge the statute.

The trial court recognized that in Poe v. Ullman, supra, this Court held that the mere existence of a State penal statute would constitute insufficient grounds to support federal jurisdiction, and that, absent a pending or threatened prosecution, no federal jurisdiction exists sufficient to support a federal declaratory judgment on the constitution-

ality of a state statute. However, the court further stated that this rule of jurisdiction was altered by Epperson v. Arkansas, 393 U.S. 97 (1968). But in that case, there were at least definable facts and a real conflict between what the teacher was prohibited from teaching and the content of the book she was instructed to use. Moreover, the school officials who created the conflict were parties to the suit and the State admitted that teaching the existence of the condemned theory would itself be grounds for dismissal and prosecution under the statute. Such a palpable clash does not exist here.

In spite of this, the court below held that because "Mary Doe" had been refused an abortion under the statute, an actual controversy between her and Appellees existed, but that since no action had been taken or even threatened against the remaining appellants, no actual controversy existed between them and Appellees. Insofar as this determination relates to Appellants other than "Mary Doe", the result reached by the court was correct. Brooks v. Briley, 274 F.Supp. 538 (M.D. Tenn. 1967), affirmed per curiam 391 U.S. 361 (1968). See Younger v. Harris, 401 U.S. 37 (1971); Boyle v. Landry, 401 U.S. 77 (1971).

Where the only plaintiff allegedly having standing by virtue of an actual controversy with defendants was not shown to exist in fact, no jurisdiction to consider the complaint lies. Muskrat v. United States, 219 U.S. 346 (1910).

Summarizing, there was no "live dispute between [any of] the [adversary] parties." Powell v. McCormack, 395 U.S. 486, 517-518 (1969). There was missing the necessary ingredient of "a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U.S. 270, 273 (1941).

Thus, there being no pending prosecutions at the time of the three-judge hearing (or at any time throughout these proceedings, for that matter), a declaratory judgment was improper. See Perez v. Ledesma, 401 U.S. 82, 86n.2(1971).

C. A THREE JUDGE DISTRICT COURT WAS NOT PROPERLY CONVENED.

The three-judge court took a broad and expansive view of its jurisdiction, which is in apparent conflict with the constrictive view this Court has repeatedly taken. Swift & Co. v. Wickham, 382 U.S. 111 (1965); Ex parte Collins, 277 U.S. 565 (1928); Oklahoma Gas & Electric Co. v. Oklahoma Packing Company, 292 U.S. 386 (1934); Rorick v. Board of Commissioners, 307 U.S. 208 (1939); Phillips v. U. S., 312 U.S. 246 (1940). The Court has been reluctant to extend the range of cases necessitating the convening of three-judge courts. Allen v. Board of Education, 393 U.S. 544, 562 (1969).

Several of the prerequisites for a three-judge court's proper convention were not present in this case. One of the jurisdictional prerequisites to the applicability of Section 2281 is a request for injunctive relief against the enforcement of a state statute. The request in this case was mere verbiage, and as has been shown, the fact of the complaint is devoid of any allegation of prosecution or threatened prosecution under the challenged statute by any Appellee against anyone. There was, simply, nothing to enjoin. "Mary Doe"

had purportedly been denied an abortion by a hospital committee because of the existence of the law. The hospital was not a party to the suit. The committee members were not parties to the suit. Neither the Attorney General, the District Attorney, nor the Chief of Police had in any way restricted, or threatened any action against any of the Appellants. No enforcement or execution of the criminal statute had been instigated or intimated by any of the Appellees, nor was there any allegation suggesting that this was so. As far as permanent injunctive relief was concerned, only a general request for an injunction against enforcing, threatening to enforce, or applying the statute, was sought. But the complaint was devoid of any alleged action or activity which, if proved existent, would be subject to injunction. An injunction must enjoin someone from doing something he is doing or is about to do. That prerequisite was entirely absent here and the plaintiff's prayer for injunctive relief was only nominally asserted in an effort to invoke three-judge jurisdiction.

The validity of this analysis is further reinforced by an examination, in the context of this case, of the directions for the form and scope of a federal injunction. In Rule 65(d),

Federal Rules of Civil Procedure, it is specifically delineated that:

> "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or association with them who receive actual notice of the order by personal service or otherwise."

The complaint asks that the Attorney General, the District Attorney of Fulton County, the Chief of Police of the City of Atlanta, and "their agents and successors" be enjoined and restrained "from enforcing, threatening to enforce, or otherwise applying the challenged statute in derogation of the rights of plaintiffs".(A. 15). But what act or acts of any of these defendants are sought to be restrained? No act or impending act by any Appellee is even alleged in the complaint. What "specific terms" could possibly be framed which would not

refer totally to only presumed future conduct of any of the Appellees? An unsupported forecast could be the only source of such an injunction. In short, the prima facie basis for the extraordinary equitable remedy of injunction against enforcement of a state statute was missing. See Ex parte Young, 209 U. S. 123, 155-156 (1908).

The gist of the complaint was an attack on the constitutionality of the statute adopted in 1968 and which has not yet been construed or considered by the State courts. Although declaratory judgment may be granted as an additional remedy in three-judge injunction suits, the authorizing statute does not give any new or wider jurisdiction with it. Western Casualty and Surety Company v. Herman, 405 F.2d 121 (8th Cir. 1968); Stanley v. Avery, 387 F.2d 637 (6th Cir. 1968); cert. den. 390 U.S. 1044; Bourazak v. North River Insurance Company, 379 F.2d 530 (7th Cir. 1967). Consequently, if a complaint fails to state a claim for injunction, as here, a three-judge court would have no other jurisdiction upon which to base a declaratory judgment. The court in this case recognized, from the pleadings and without any evidence, that no injunction could lie. It summarily dismissed the request, stating that "the instant case

does not involve granting injunctive relief." (A. 80, emphasis added). Where it has been held that declaratory judgment could be granted and an injunction withheld, it is submitted that this is only when the complaint states a cause for injunction but for some reason within the court's discretion, such as for the sake of federal abstention, relief is denied. Powell v. McCormack, 346 U.S. 486 (1969); Zwickler v. Koota, 389 U.S. 241 (1967).

Here, the underlying basis for three-judge jurisdiction, that is, a bona fide request for injunction, is lacking. Therefore, the ancillary relief cannot properly be granted because the foundation is missing. The mere recitation of a jurisdictional prerequisite does not supply it, particularly when couched in such broad and general terms as are evident in the complaint in this case. The lip-service given the injunctive aspects of the case clearly indicate that it was no more than a vehicle to justify a three-judge court. The court itself gave short shrift to that aspect of the case, denying the injunction summarily. A three-judge court is only necessary where an injunctive decree "may issue" on the ground of federal unconstitutionality of the state statute. Florida

Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960). The complaint must at least formally allege a basis for the equitable relief of injunction. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962). That criteria was not present in this case.

Thus, the question is whether, in the absence of a request of some substance for injunctive relief, a three-judge court is properly convened:

> ". . . the requirement that the action seek to enjoin a state officer cannot be circumvented by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute.' Wilentz v. Sovereign Camp, 306 U.S. 573, 579-580, . . ." Moody v. Flowers, 387 U.S. 97, 102 (1967).

It therefore follows that a nominal request for injunction against three defendants whose action was not the effective means of enforcement of the statute, cannot provide the prerequisite base for a three-judge court to examine the constitutionality of a state statute.

Likewise, the absence of any real involvement of the grant or denial of injunctive relief below adversely affects the jurisdiction of this Court in the attempted direct appeal. Mitchell v. Donovan, 398 U.S. 427 (1970).

CONCLUSION AS TO JURISDICTION

The case below did not present a situation over which federal jurisdiction might vest in order to authorize the court to hear and determine the case. Secondly, a three-judge court was not properly convened. Accordingly, the case at this juncture requires only reversal of the opinion and judgment below, or remand for dismissal of the complaint.

ARGUMENT

A. THE CASE MAY NOT PROPERLY PROCEED AS A CLASS ACTION.

Before proceeding further with the merits of the substantive issues sought to be litigated, the outline of the case must be further defined so that its context is clear.

The suit was brought as a class action under Rule 23 of the Federal Rules of Civil Procedure (A. 6), with the plaintiffs claiming to represent at least six sub-classes: women represented by "Mary Doe", physicians, psychiatrists, nurses, ministers and social workers. (A. 13). The use of this unwieldy group of plaintiffs for important constitutional litigation was never justified by the plaintiffs or discussed by the court below. In the complaint (A. 6, paragraph 5), plaintiffs alleged that a class action is proper without even specifying which form of class action was appropriate to the circumstances. Rule 23 provides three clearly delineated alternatives. Rule 23(b)(1), (2), and (3). Nor did plaintiffs state facts to meet the prerequisites set forth in Rule 23(a).

The most serious defect resulting from this approach is that the class which "Mary Doe" claimed to represent was described in ambulatory terms which changed its complexion at various times.[11] Different issues arise according to the limits of the definition of the class. For example, "Mary Doe" claims to be married (A. 7). Does she therefore represent married women only? What effect, then, does the declaratory judgment have on unmarried women? Further, "Mary Doe" alleges she is poor (A. 7) Does her class contain only those who cannot afford an abortion at a private hospital? "Mary Doe" is allegedly a resident of Georgia (A. 7). Could she represent non-residents wanting an abortion in Georgia? The court made no findings on these important questions.

Rule 23(c)(3) requires the court to ". . . describe those whom the court finds to be members of the class." There was no such description in either the opinion or judgment of the district court even though that court considered it

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[11] Infra, pp. 6-7.

proper to examine the entire Georgia abortion statute. The class action is a method for adjudication, not a procedure allowing advisory opinions. Without a limitation and description of the class, the case is necessarily filled with numerous issues which are merely amorphous and hypothetical. A description of the class is absolutely necessary because a judgment is effective only on those found to be members. (Rule 23[c] [3], F.R.C.P.) The effect of the judgment is unpredictable and incalculable unless the court has specified those whose rights have been adjudicated.

The use of the class action mechanism for the five groups of professionals raises less serious problems since the trial court correctly dismissed them for lack of a justiciable controversy. However, the propriety of a class representation is again questionable. These groups sued on behalf of themselves and others similarly situated (A. 7-9), again without stating who such people would be. Certainly they could not represent all members of their respective professions because not all would share their views and interests. Contrary to Rule 23(a), the class action would be improper because (a) there are not

common questions of law or fact; (b) the claims are not representative; and (c) a representative party may not adequately represent the interests of the class.

If they wish to represent smaller groups within the ranks of their professions, such groups must be described. The claims of the doctors, nurses, ministers, and social workers, then, are doubly hypothetical. Not only is there no justiciable issue involving them, there is no identifiable group whose rights could be determined in the context of this litigation.

These additional Appellants, who were dismissed and now seek relief therefrom, are in no different position than any other persons in the same professions who might assert a generally described disagreement with the statute in a blanket claim that it infringes on their rights. Such a superficial antagonism does not make a case for the determination of constitutional issues. Hard fact gives way to surmise and conjecture in such circumstances. Precision is totally lacking.

Having thus arrived in this Court, Appellants seek a further condemnation of the entire statutory scheme, claiming facial

unconstitutionality with respect to every aspect of the criminal abortion law. Not only is its application to "Mary Doe" challenged, but also its application to her undefined class, and to the tag-along Appellants and the "classes" they represent. On top of this, Appellants again seek injunctive relief.

Putting aside for the moment the gateway jurisdictional issue and the roads-end injunction issue, the merits of the case simply call for a determination of whether the Georgia criminal abortion statute, part and parcel, is contrary on its face to the mandates of the federal constitution.

B. APPELLANTS' ARGUMENT IS STRUCTURED ON A PREMISE WHICH THE LOWER COURT REFUSED TO ACCEPT AND WHICH IS UNTENABLE HERE.

The propositions of the appeal are all moored to a single claim. Though variously expressed, and divergently relief on in attacking the parts of the statutory scheme, the mooring of the challenge is the belief that any woman has a fundamental right, constitutionally protected, to independently determine that

a child which she has conceived shall not be brought to birth, and to procure an abortion of its development. (A. 12-13). Although Appellants seem to agree with the court's bounded recognition of such a right (Appellants' Brief, p. 22) and purport to go on from there (i.e., Arguments "B" through "F") 12/ this is not really the case. Appellants dispute the limitations on the right which the court pronounced, both expressly and by the whole tenor of their argument.

The specific expressions are illustrated by the repeated references to "the right to terminate an unwanted pregnancy". (Appellants' Brief, e.g., pp. 12, 23, 24, 27, 42). This is far different from what the court formulated as a right to a "necessary" abortion. (A. 84-85, see statute as revised by court, Appellants' Brief, pp. 3-7). Mere desire or con-

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12/ Outlined in Appellants' Brief, Index pages "i" through "iii".

venience was specifically rejected by the court as a parameter of the right (A. 81), but Appellants speak assumingly of the "right to abortion". (Appellants' Brief, pp. 14, 16).

Secondly, Appellants seek the invalidation or the total annihilation of the statute, the result of which would be to cast abortion into the pot with any other medical procedure, whether it be the removal of a tooth or appendix or any other part of a person's body. Appellants admit of no distinction and indeed tout the availability of simple, safe abortion techniques which purportedly need not even be done in a hospital. (Appellants' Brief, pp. 38-40). The procedural controls on abortion, Appellants say,". . . remain as a barrier to the constitutional rights asserted and will obstruct and interfere with such rights. . . ." (Appellants' Brief, p. 10).

Though the proffered basis for challenging the court below's standard of "necessary in the best clinical judgment" of the physician involved, is that such a standard is vague, a reading of the entire brief reveals that Appellants' simple aim is the removal of <u>all</u> state-imposed standards and controls on abortions, vague or not. In pursuit of this end, Appellants argue that there is no legitimate compelling state

interest which might justify a limitation on this "right". (Appellants' Brief, p. 24-27). They argue further that the urgencies of time and economic poverty and the panoply of modern methods, all pragmatically speak against control. (Appellants' Brief, pp. 35-42). Finally they argue as to the medical personnel represented, that their right to practice their professions are curtailed because they are not permitted to recommend or perform an abortion which they determine is "the correct [not even "necessary"] medical treatment." (Appellants' Brief, pp. 44-45). Cast in that light, it is beyond doubt that the mooring which Appellants urge the Court to catch onto is an unrestricted right to abortion in every case where a woman "wants" one and her physician considers it "advisable".

Pains have been taken to point out this underlying thread not only because of its obscurity, particularly initially, but also because of the weakness it lends the arguments advanced. Remove it as a premise, and the individual claims become a house of cards.

Hypothesize for a moment a real acceptance of the core of the holding below insofar as it related to the fashioning of a right, keeping in mind

that Appellants outwardly profess agreement. (Appellants' Brief, p. 22). The court established that the formation of an embryo, "a potential human life", as it called it, granted the State a legitimate area of control over the termination of that life before its birth. (A. 82). With that as a premise, the court measured the State's controls and found them maintainable insofar as they reasonably restricted the quality of the decision to terminate that life and the manner of execution of that decision. (A. 84).

If Appellants truly agreed with the court's premise, they would not be able to argue that the State has no interest in the fetus, because the argument thereby denies the premise. Nor would they be able to argue that the procedure requiring consultants and hospital committee approval is unconstitutionally "cumbersome, time-consuming, and restrictive". (Appellants' Brief, pp. 31-42). They see it simply as an irrational restraint on a desired medical service, completely ignoring and discounting the potential human life whose existence must be weighed in the balance. Nor would they be able to argue that physicians are, by the court-revised statute, denied the right to practice medicine "in accordance with their best professional judgment." (Appellants' Brief,

p. 44). What this means, they say, is that they should be loosed from the statute's restraints so that they could recommend or perform fetal abortions whenever they felt it is "a correct medical treatment" or "medically advisable." (Appellants' Brief, pp. 44-46). They say they should be as free to make this judgment as they are to make any other decision regarding a medical procedure. (Appellants' Brief, p. 46).

This latter position perhaps most graphically portrays the departure of Appellants from the premise established below. If that premise were truly accepted as "correct" (Appellants' Brief, p. 22), Appellant physicians would not totally ignore in their argument the fetus' presence as an additional factor to consider in making "their best professional judgment". The sanctions of the statute "deny the individual physician the right to give medical advice and to perform medical procedures based only on his concern for the health and life of his patient" they assert indignantly. (Appellants' Brief, p. 45). Such a statement is patently unconcerned with "the potential human life" and instead displays in bold relief the uncompromising assertion that the removal of an unwanted fetus is just

as much a right as the removal of an unwanted mole.

Thus, we cannot be led into believing that the invalidation of the procedures, which Appellants urge this Court to pronounce, will leave intact the "correct" portion of the decision below. The profession of agreement deflects from the underlying thread and distorts the results which would materialize from acceptance of Appellants' arguments. Remove the procedures and restrictions on abortions set up carefully by the State, and the safeguards built to protect the "potential human life", which is already maturing, dissolve.

Thus, the issue which the Court has before it is extraordinarily fundamental. In order for Appellants to prevail in their request, their premise must be tested. The Court should not simply move from an acceptance of the lower court's premise to the assertions of the Appellants purportedly stemming from it, because Appellants' assertions grow out of a different and antagonistic root. Appellants' attack cannot be grafted onto the curtailable right established by the court below. It demands the proclamation of stronger, and even absolute, right in order to survive.

The pivotal question is whether whether a woman has a constitutionally protected right to procure a termination of fetal life developing within her with no more restriction by the State than is justifiable for other medical procedures. This question may be addressed despite the bareness of the record and the absence of particularized facts. It does not need a fully developed case involving an actual application or attempted enforcement of the criminal abortion law of Georgia. The scope of the issues reaches much beyond any individual case.

C. GEORGIA HAS LONG MAINTAINED A PUBLIC POLICY OF RECOGNIZING THAT AN UNBORN CHILD HAS PROTECTIBLE INTERESTS.

1. The real meaning of the criminal abortion law invalidates both the premise of the court below and Appellants' premise.

Appellants' multitudinous assertions in this Court must fail at the outset for the fundamental reason that they are based on the erroneous presumption that a woman has an unfettered constitutional right to an abortion if she desires one. This view denies and obliterates any interest or right which an unborn child may have, and which is protectible by the State as an exercise of its police power impelled by a justifiable public policy.

An understanding of their position reveals in bold relief the absolutism of their premise. The extremeness of their espousal denotes not only that Appellants disagree with the entire substantive holding below, even including the seemingly favorable ruling with regard to the woman's rights, but also that they must go far beyond the ruling below to launch an attack on the

remainder of the statute.

The State does not agree with the seemingly moderate view taken by the lower court, and indeed sought an appeal therefrom in this Court. Bolton, etc., et al. v. Mary Doe, October Term, 1970, No. 973, dismissed for lack of jurisdiction, 402 U.S. 936 (1971); intermediate appeal pending in the United States Court of Appeals for the Fifth Circuit, No. 71-1932. With that in mind, the gap between Appellants' far more absolute position and that maintained by the Appellees is recognizably wider.

But even if Appellants had accepted the holding of the lower court in this regard, the argument herein undermines the underlying premise and is applicable to a reconsideration of it. Thus, the claimed "right", whether considered curtailable, as the court below regarded it, or whether considered absolute, as claimed by Appellants, requires scrutiny by this Court in considering the appeal. This is so particularly because the claimed "right" is not an established, universally recognized one but has rather been newly enunciated by the decisions of some, but not all, of the lower courts which have had occasion to rule on the matter. (See lists of illustrative cases, collected in Appellants' Brief, pp. 23-24, footnote 2).

2. The origin and history of Georgia's abortion laws signify their fetal-life-directed purpose.

The State's concern for the entity known as the unborn human child is demonstrated not only by the abortions laws, but also throughout its history in other ways. These ways will be discussed in the next subsection. As to abortion, however, the prohibition did not begin with the statute of 1865-66, or 1876, as Appellants contend. (Appellants' Brief, pp. 24-25).

By the laws of Georgia of 1876, the legislature simply made abortion and feticide specific crimes under the Penal Code. Ga. Laws 1876, p. 113, Appendix "B" herein. Prior to that time, it is apparent that such crimes were prohibited in Georgia by virtue of the common law's incorporation into the body of Georgia's criminal law by statute. An Act passed on February 25, 1784, incorporated into Georgia law all the common laws and statutes of England which were in force and binding on the inhabitants of Georgia on May 14, 1776, except as otherwise altered by the Georgia legislature. Ga. Laws 1874, p. 404, reprinted at Prince's Digest, 310-311.

The comprehensive Code of Georgia of 1861 specifically carried forward this provision in its very first section. Ga. Laws 1860, p. 24; Code of Georgia of 1861, pp. 1-2.13/

13/ In 1953, former Chief Justice of the Supreme Court of Georgia William S. Jenkins, then Chief Justice Emeritus, spoke on "The Common Law [in Georgia] and Its First Codification by Thomas R. R. Cobb", and the speech appears at 16 Ga. Bar Journal, No. 1, pp. 137-147. Therein he commented: "It is doubtful if the average educated citizen fully realizes that the common law of England together with the act of Parliament supplementing of modifying it, as it existed in 1776, is of force in Georgia today. It is the backlog of our jurisprudence, its most important part. It is in fact all the law we have as it may have been supplemented or modified by our Constitutions and statutes. But even then the courts always construe with great strictness, and in favor of the Common Law, any statute which it is claimed has modified it." Id. at 138.

The Constitution of the State of Georgia of 1865 also expressly adopted the common and statute law of England, of force in Georgia in 1860. Constitution of the State of Georgia, 1865, Art. V, Sec. I, Par. 5; Code of Georgia of 1867, p. 982-983. 14/

See also the general catchall provisions in the Code of 1873, Sections 4509 and 4529, pp. 814 and 181, regarding offenses against the public peace and tranquility and against public justice. These sections were discussed by the Supreme Court of Georgia in Prichard v. State, 160 Ga. 527 (1925), when they were, as misdemeanors, a part of the Penal Code of 1910, §§ 339 and 366:

> "These sections did not create new offenses unknown to the common law. They only adopted common-law crimes, and made

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14/ A discussion of the existence and force of the common law and statutes of England is contained in Reed, A Handbook of Georgia Criminal Law and Procedure, Macon, 1873, pp. 64-66.

> them Georgia crimes. So in Ormond v. Ball, 120 Ga. 916 (48 S.E. 383), this court held the first of these sections was sufficiently broad in its terms to authorize the punishment of any offense which at common law was an offense against public justice. These sections punished persons only for things which were offenses against public justice or against the public peace by the common law." Id. at 528-529.

Thus, there can be no doubt that if abortion was a crime in England in 1776, it was also a crime in Georgia, by incorporation, in that period prior to the particularation by statute enacted in 1876. 15/

15/ Reed presaged the adoption of the statute. In discussing murder and infanticide, supra, footnote 14/, at 178, he noted in 1873 that "our law should punish criminal abortion." This reference was to the need for a specific Georgia statute, because he also wrote: "In most of the cases, if not in all, the Courts would apply the rules of the common law to define

(Continued on next page)

Now, what of the law of England with respect to abortion, upon which Georgia law depended prior to the statutes passed in 1876. Keeping in mind that the law in this respect which existed in England in 1776, was extant in Georgia, Blackstone's Commentaries, first published in 1765-1768, provide the key.

The subject of abortion is discussed by Blackstone in the context of the right of personal security. This is described as one of the three principal rights of mankind, protected to the people of England. 16 / The right of personal security was regarded by Blackstone as an absolute right, vested by the immutable laws of nature, and in that context, abortion was recognized by Blackstone thusly:

(15 / Continued)
any such unenumerated offense. The old authorities, Coke, Hale, Hawkins, and expecially Blackstone - who is followed more than any other by the Penal Code - would be especially useful." Supra, footnote 14 /, p. 66.

16 / Blackstone's Commentaries, p. 129.

"I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation.

"1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter.[17] But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor[citing 3 Inst. 50].

17/ The footnoted authority is Bracton 1.3, c.21, translated from Latin in Cooley's Blackstone, Volume I, p. 119: "If anyone (continued on next page)

"An infant in ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. 18/ And in this point the civil law agrees with ours." 19/ Blackstone's Commentaries, Volume I, Book I, pp. 129-130.

(17/ Continued)
strikes a woman when pregnant, or administer poison to her by which abortion shall ensue, if a child shall be already formed, and particularly if it be alive, that person is guilty of manslaughter."

18/ Here Blackstone footnotes that "Every legitimate infant in ventre de sa mere is considered as born for all beneficial purposes. C9, Litt. 36, 1 P.Wm. 329.

19/ The Latin authority footnoted by Blackstone is translated in Cooley's
(continued on next page)

Thus, the right to life was recognized in the law of England as being one of the most fundamental and natural rights which existed even without government, and the right extended at least to some extent to an unborn child.

Theearly English statutes, which made certain attempts to procure the miscarriage of any woman highly penal, and the acts up to 1868, are collected and discussed in Storer and Heard, Criminal Abortion: Its Nature, Its Evidence, and Its Law, Boston: Little Brown & Co., 1868, Book II, Chapter II. The earliest English statute cited is 43 Geo. III, ch. 58, which was passed in 1803. Known as Lord Ellenborough's Act, abortion of a quick child was punishable by death, and that of an

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(19 / Continued)
Blackstone as "those who are in the womb, are considered by the civil law to be in the nature of things, as they are capable of being benefited." Blackstone's footnote "(s)", Cooley's Blackstone (4th Ed.) Vol. I, p. 119.

unquick child was also a felony, and variously punishable, including transportation of up to fourteen years. Id. at 165-166. Thus, the highly penal regard given to abortion, which was evident at the time of Bracton, was reinstated. The common law of England in 1776 was thus at a point between Blackstone's description and the statute of 1803. 20/

Whatever may have been the English law in force in 1776, which the Georgia legislatures repeatedly incorporated into the State's body of criminal law, two things are clear. It cannot be doubted that criminal abortion was a part of the law of Georgia from its inception long before the statute of 1876, and secondly, the prohibition was based at least in part on a recognition

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20/ Storer and Heard, supra, also discussed many English cases involving various aspects of abortion, both at common law and under statute.

of, and concern for, the life of the fetus. The proposition advanced by Appellants (Appellants' Brief, pp. 24-27), that the sole purpose of early abortion laws was the protection of the pregnant woman's life and health, is therefore unsound. The facts of history show a deeper and more fundamental concern with the rights of a protectible entity other than that of the mother.

The accuracy of this position is further enhanced by reference to Bishop's New Criminal Law, wherein he described abortion as "one of the leading offenses against population, and therefore . . . indictable at the common law." Bishop's New Criminal Law, Vol. I (8th Edition, 1892), p. 312, citing Stat. Crimes, 6 744. See also the discussions concerning abortion at pp. 446-447, 195-196, 465-466, and 357-358.

The law's protection of human life by way of criminal sanction of varying degrees as respects particular points on the continuum of life is described by Bishop in the chapter on Feloneous Homicide, Specific Offenses. Abortion is listed as one of the "Dangerous misdemeanors":

> "If one to commit on a pregnant woman the dangerous misdemeanor of abortion, administers to her a drug or employs instruments in consequence whereof she dies, or the child is prematurely born and dies from the too early exposure to the external world, the homicide is murder." Id. at 394.

The underlying concern for the unborn child, rather than solely the life and health of the mother (if that were a concern at all) is further illustrated in the lengthy discussion on "abortion" in 1 Ruling Case Law, pp. 69-88.

It is with that background that the legislature enacted the first specific abortion statute in 1876. 21/, which statute the Georgia Supreme Court in 1920 noted "removed from the operation of the then existing penal laws of the State only such offenses as were clearly included within its own provisions." Summerlin v. State, 150 Ga. 173, 176 (1920). 22/

The law which provided the punishment of death or life imprisonment for foeticide and declared abortion of a quick child as assault with intent to murder, and provided misdemeanor punishment for abortion of an unquick fetus, demonstrates the State's recognition of the unborn fetus as a protectible human child.

21/ Ga. Laws 1876, p. 113, reproduced as Appendix "B" herein.

22/ The court went on to say in this case involving manslaughter of the mother: "It is unnecessary to discuss the common law on the subject of criminal abortion. This is a prosecution for the killing of a human being, [the mother], not the unborn, unquickened fetus." Id. at 176.

This is also clearly demonstrated
y the decisions applying and construing the 1876 statute. Under an indictent for assault with intent to murder rought pursuant to Section 2 of the Act, he Supreme Court of Georgia held:

> "The word 'child' as used in section 81 of the Penal Code means a 'living child,' that is to say 'an unborn child so far developed as to be ordinarily called "quick"' and which is still alive when the alleged unlawful means are employed to produce the miscarriage or abortion." Taylor v. State, 105 Ga. 846 (1898).

"Quick" was subsequently defined o mean "so far developed as to move r stir in the mother's womb." Sullivan . State, 121 Ga. 183, 187 (1904). he recognition of the unborn fetus as human child was unmistakably clear hen the court said in the companion ase of Barrow v. State, 121 Ga. 187, 88 (1904):

> "An intent to destroy an unborn child so far developed as to be ordinarily called 'quick' may exist without absolute knowledge

> that such child is 'quick'. If defendant's purpose was to destroy the foetus, and in so doing he killed a child which was 'quick,' the criminal intent would extend to the consequences of his act. Powe v. State,(N.J.), 2 Atl. 662."

The purpose of the statute was primarily the protection of the fetus and its life, rather than the mother's interest, is drastically pointed out by the Barrow Court:

> "Neither the consent of the female to the abortion, nor a purpose to conceal her shame by an operation, will excuse the criminal act, and an instruction to this effect was not erroneous." Id. at 188.

The failure of the law to reach back to protect a child not yet "quick" may have been due more to a lack of understanding of embryology than to a callous denial that such a being was "a child". To sum it all up, the statement of the Supreme Court of Georgia in Passley v. State, 194 Ga. 327 (1942) is appropriate:

"It is evident that in enacting this statute [Ga. Laws 1876, p. 113], the legislature was undertaking to provide by penal law appropriate penalties for the destruction of an unborn child." Id. at 329. 23/

23/ For a further discussion of this first statute, see also Stubbs, Georgia Law of Children, 1969, §§ 167 - 170.

In 1968, the Georgia legislature modernized the nearly 100-year-old abortion statute, and it is that statute against which the broadside attack is launched by Appellants. There is no question that the legislature intended to retain it as a part of the criminal law in the State and did not intend to destroy its historical meaning and purposes by treating the termination of life of an unborn child as merely an effort "to treat the problem as a medical one", as the court below erroneously concluded. (A. 82). If that had been the intent, it undoubtedly would have been taken out of the criminal law and inserted instead into the public health portions of the statute. (Title 88). Moreover, and more substantively, the stringent safeguards and portions surrounding the taking of such life would probably not have been necessary.

The court below alluded to a peculiarity of consequence which may affect whatever law is actually in effect in Georgia when it footnoted in its judgment that:

> "It is the intention of this Court that our decision reach the codification of identical provisions of Georgia

> Code Ann. § 26-9925a and corresponding provisions enumerated above if such codification has any force as law." (A. 88, fn. 1).

The underlying confusion has resulted because of a unique sequence of events. The 1876 Act was amended by an Act specifically and exclusively relating to the crimes of abortion, foeticide, and infanticide. (Ga. Laws 1968, p. 1432). The bill upon which that Act was based was first introduced in 1967. (1967 House Journal 338, House Bill No. 281). After much debate and consideration, including public hearings, the bill as altered was passed and sent to the Governor on March 6, 1968. The Governor did not attach his signature of approval, so that, by virtue of the Constitution of Georgia of 1945, Sec. 2-3015, the Act presumably became law 30 days after adjournment on March 8.

In the meantime, however, the Criminal Code Commission's proposed Code was sent to the legislature and, in the course of its deliberations, the latter revised the Commission's proposed sections on abortion so that they conformed substantially with House Bill No. 281, the independently proposed revision, as passed.

The Criminal Code of Georgia was approved by the Governor on April 10, 1968, but its effective date was July 1, 1969. (Ga. Laws 1968, pp. 1249, 1351). A comparison of the Criminal Code provisions (§§ 26-1201 - 26-1203) with the Act based on House Bill 281, (Ga. Laws 1968, p. 1432), reveals that they are not entirely identical. 24/

Thus, the desirability of requiring repair to the State courts first, for a ruling on what law is effective (or was effective when suit was brought below), before constitutional issues are debated, would be particularly in order in regard to this statute. The recent case of Gunn v. State, 227 Ga. 786 (1971) mentions but does not decide the question of effectiveness. That same question is now pending in State habeas corpus pro-

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24/ See in addition the Editorial Note following the unofficially codified section 26-9920(a) which appears at the end of the official Criminal Code of Georgia.

ceedings brought in Habersham County Superior Court, Georgia: Gunn v. Ballkcom, Civil Action No. 4022.

A study of legislative history is unfortunately not published in public records citable to this Court. It would require evidentiary development, or construction by a State court, to develop in detail the intentions of the legislature with respect to each aspect of the statute. That the overall intention was protection of the unborn child is manifested, however, by the history of the abortion laws in Georgia, which has been outlined above, and by an examination of the entire statutory scheme.

One exceedingly clear illustration of this is the unique feature providing for expeditious judicial determination of the constitutional or legal rights of a fetus sought to be destroyed. (Criminal Code of Georgia § 26-1202(c); Appellants' Brief, pp. 5-6. The court below, without explaining how such a guardian provision would impermissibly infringe the mother's rights, struck it in its entirety. (A. 85, 88). It is inconsistent with the court's recognition of "a potential human life" over which the State has "a legitimate area of control" (A. 82), to deprive the entity in which that life is reposed of the

legal process to determine its protectibility. Whether or not that unborn child has a constitutional right to reach birth, the State's attempt to leave that question as well as others respecting the rights of a living fetus, open for judicial review, demonstrates its vital interest in fetal life.

The unsettled legal issue, for example, of whether an unborn child, at any age, is entitled to Fourteenth Amendment due process of law, before it is deprived of life, is embraced in the statutory scheme. It has been held that a human being has an inherent right to due process of law. Burns v. Lovett, 202 F.2d 335, 91 U.S. App. D.C. 208, aff'd, Burns v. Wilson, 346 U.S. 137, reh. den. 346 U.S. 844 (1953). That a child en ventre sa mere is regarded in law as a human being from the moment of conception, or from the time it can "stir", for at least some purposes, has been repeatedly stated. See, for example: Bonbrest v. Kotz, 65 F.Supp. 138 (D. D.C. 1946); Tucker v. Carmichael, 208 Ga. 201 (1951); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Mitchell v. Common wealth, 39 Am.Rep. 227 (Ky. Ct. App. 1879); "In Defense of the Right to Live: The Constitutionality of Thera-

peutic Abortions," 1 Ga. Law Review 693 (Summer 1967); Quay, "Constitutionality of Abortion Laws: Rights of the Fetus," 8 Child and Family Quarterly, No. 2, p. 169. The purposes of the Fourteenth Amendment are not inapplicable. With respect thereto, this Court said in Strauder v. West Virginia, 100 U.S. 303 (1880):

> "[The Negro race's] training had left them mere children, and as such they needed the protection which a wise government extents to those who are unable to protect themselves." Id. at 306.

The analogy is complete when the words of the Supreme Court of Georgia are considered:

> "In . . . general, a child is to be considered as in being from the time of the conception, where it will be for the benefit of such child to be so considered." Morrow v. Scott, 7 Ga. 525, 537 (1849), quoted in Hornbuckle v. Plantation Pipeline Co., 212 Ga. 504, (1956).

3. Other manifestations of state concern for the unborn child.

That the State seeks to afford security to the fetus is also demonstrable in other ways. The criminal abortion law is only one of the public policy manifestations. A putative father is obligated to provide not only for the maintenance and education of his illegitimate child, but also for the pre-birth expenses incurred with respect to such child. Ga. Code of 1933, § 74-9901. Since at least 1793, the posting of security for the support and education of an illegitimate child has been required even before its birth. Ga. Code of 1933, § 74-301 et seq. The concealment by a woman of the death of her unborn child which, if it were born alive would be a bastard, was a misdemeanor. Ga. Code of 1933, § 26-1106. In Bull v. State, 80 Ga. 704 (1888), a father who abandoned his child before it was born and persisted after its birth, was declared guilty of a misdemeanor. Hornbuckle v. Plantation Pipeline Co., supra, and Fallow v. Hobbs, 113 Ga. App. 181 (1926), illustrate legal protection to unborn children in the area of torts. In property law also, legal rights are established. Ga. Code of 1933, § 113-904, as amended Ga. Laws 1968, p. 1093, provides the rules of inheritance, and Ga. Code of 1933, § 36-310 protects unborn remaindermen. See also New v. Fennell, 222 Ga. 630 (1966). Contrary to Appellants' statement (Appellants' Brief, p. 24,

fn. 3), a convicted female who was quick with child may not be executed until after delivery of the child when she is no longer quick. Ga. Code of 1933, §§ 27-2519, 27-2520. This list is by no means exhaustive but leaves no doubt as to the State's broad protective policy towards unborn children. 25/

25/ Nor does the State abandon them after the event of birth. See provisions for adoption, Ga. Code Ann. Chapter 74-4; Bastardy Proceedings, provided in Chapter 74-3; Children and Youth Act, authorizing a wide range of services under the State Division of Children and Youth, Chapter 99-2; Medical and Welfare Assistance Programs pursuant to Ga. Code Ann. §§ 99-142 through 99-146; "Hospital Care for the Indigent" Program, Ga. Code Ann. Chapter 88-23.

D. THE ABORTION LAW MANIFESTS A LEGITIMATE BALANCING OF COMPETING RIGHTS AND INTERESTS.

Now that the interest of the State in protecting from unchecked slaughter the unborn but alive children over which it exerts jurisdiction has been documented, it remains to examine the exertion of that interest in connection with the competing interest of some pregnant women to free themselves from the responsibilities of providing the harbors for those unborns. The introduction of the conceived and developing life into the picture gives it an unavoidable new dimension and makes it inapposite to that which exists in the right to privacy and marital relationship cases. In circumstances such as that litigated in Griswold v. Connecticut, supra, the State had no legitimate objective which justified its interference with the rights that transcended even the specific enumerations of the Constitution. Here, however, the entity of the living embryo or fetus becomes a factor which may not be overlooked. It has entered the continuum of the life cycle, and the fact that it needs the environment of the mother's womb to survive and develop to maturity for birth removes control of its existence from the mother's uncensured desires. Though she

may wish to be "let alone", she has already altered the possibility of such an independent status.

The State, however, recognizing its own limitations and the shortcomings of the world in which it must operate today and recognizing also the need to secure the happiness and health and well-being of women who become pregnant, has sought to strike a balance between the competing interests of the woman and the unborn child. It has therefore afforded to the developing fetus not an absolute legal right but rather a right circumscribed by limitations which are reasonably related to other legitimate state goals.

Hence, the 1968 extension of the exceptions to the general rule forbidding all abortions except to preserve the mother's life. The effort to grasp the weighty issues involved in the complex aspects of the relationship between the unborn child and the unwanting pregnant woman is fraught with questions that reach every area of human knowledge and judgment, including the medical, the scientific, the legal, the economic, the moral, and so on. The State has always recognized in this matter of abortion that there are competing protectible rights. Consequently, its attempt to balance these rights throughout its history demonstrates its

acknowledgement of its duty to do so. "(T)he right of every person 'to be let alone' must be placed in the scales with the right of others . . .", said this Court in the context of communications in Rowan v. Post Office Department, 397 U.S. 728, at 736 (1970).

Here, the State has struck a balance which it believes is in keeping with the times, and this balance is surrounded with the safeguards of careful decision-making by those best qualified to make what remains in the final analysis a medical decision, checked by the availability of judicial review. Such an effort cannot, on its face, be regarded as contrary to constitutional principles. The resolution of the intertwined interests, rights, responsibilities, and duties is primarily a state function. The responsibility of this Court, on the other hand, as it has clearly recognized, is rather to construe and enforce the Constitution and laws of the land as they are, and not to legislate social policy. Evans v. Abney, 396 U.S. 435 (1970). Nor does it sit as a superlegislative body and become concerned with what philosophy a state should or should not embrace. Sniadach v. Family Finance Corporation of Bayview, 395 U.S. 337 (1969)

And yet this is precisely what Appellants urge this Court to do here. The economic, social and even philosophical problems presented should more appropriately be taken up with the state legislature and should not be foisted onto the Court, as these matters are not its business. Dandridge v. Williams, 397 U.S. 471 (1970). The State has clearly demonstrated that it has a valid state objective in the criminal abortion laws, an objective continually existent in Georgia for almost 200 years, and the adoption of a new scheme which was patterned after a widely extoled "model" statute does not contravene constitutional requisites but rather is within that broad scope which legislative bodies have to experiment with social problems. Ferguson v. Skrupa, 372 U.S. 726 (1963).

E. APPELLANTS' CLAIMS IN THIS COURT SHOULD BE DISMISSED.

In considering the merits of Appellants' substantive claims, the Court need not assess the wisdom or providence of the policy underlying the state law. As has been enunciated, its duty is at an end when it finds that the federal constitution does not deny the state the power to enact such policy into law.

Carpenters and Joiners Union of America v. Ritter's Cafe, 315 U.S. 722, reh. den. 316 U.S. 708 (1942). Let it not be surmised for a moment, however, that doubts should arise as to the wisdom of the policy here. It is widely accepted as basic. As succinctly put:

> ". . . the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection before as well as after birth." Declaration of the Rights of the Child, General Assembly of the United Nations, November 20, 1959, Official Records of the General Assembly, 14th Session, pp. 19-20.

And here, where Appellants would try to give a myriad of unconstitutional constructions to the statute which has yet to be tested or construed in the state courts, the failure of Appellants to show that it is scarred with an inevitable unconstitutional effect, should lead to its current reinstatement. United States v. O'Brien, 391 U.S. 367 (1968). The unconstitutional interpretations affixed by Appellants to the provisions of the criminal abortion law are products of only one approach. They are not authoritative interpretations and

indeed such interpretation by the courts of the state could well lead to an avoidance of the constitutional issues sought to be engendered by Appellants. Reetz v. Bozanich, 397 U.S. 82 (1970).

Attention is briefly directed to some of the remaining sections attacked by Appellants.

1. The standard remaining is not vague.

The claim is that the court-revised standard is unconstitutionally vague. By striking certain portions of the statute, the court below obtained in effect a prohibition against abortions other than those that were "necessary in the best clinical judgment" of the physicians charged with making the determination. (A. 88; Appellants' Brief, pp. 3-4). The judgment was to have a broad medical basis, i.e., the totality of circumstances surrounding each patient. (A. 163).

The standard enunciated below clearly departs from the intent of the legislature to more strictly curtail destruction of fetal life, and the State disputes the validity of the court's adopting such a standard while at the same time we assert that the standards enumerated by the legis-

lature pass constitutional muster.

Without taking the side of the court-constructed standard, Appellees dispute the proposition that it is void for vagueness. It is, on its face, not unlike the judgment which physicians daily apply in determining whether a myriad of other medical procedures should be undertaken. The Oath of Hippocrates, as a matter of fact, provides in part:

> "I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous." 14 Encyclopedia Americana, p. 201.

If the State law as adopted by the legislature is not ultimately reinstated, it is submitted that the experience of physicians in applying the court-enunciated standard since mid-1970 would be most pertinent to a determination as to whether it was impermissibly vague.

Finally, viewed in the context of the Court's opinion in United States v. Vuitch, 400 U.S. 813 (1971), the medically-weighted standard should not be

regarded as unconstitutionally vague at this juncture.

2. On the face of the statute, due process is not denied the abortion-seeking woman.

Appellants suggest that due process is not provided by the procedural aspects of the statute. However, it is obvious that the procedure delineated is a workable outline. The approval requirements may well be construed to include personal confrontation with an abortion committee, mechanics for the apprisal of the applicant of the reason for denial, or a review procedure when the initial decision is adverse. Only the bare requisites of the procedure are outlined in the statute, which is broad enough to embrace whatever constitutional requirements are applicable. The many constitutional issues broached by Appellants in their wholesale and many-faceted attack are thus premature. The preliminary guesses regarding local law and the mere possibility of unconstitutionality upon which Appellants' postulate rests, make their claims inappropriate for further consideration at this stage. Spector Motor Service v. McLaughlin, 323 U.S. 101 (1944); Leiter Mineral, Inc. v. United States, 352 U.S. 220, reh. den. 352 U.S. 1019

(1957); Everson v. Board of Education of Ewing Township, 330 U.S. 1, reh. den. 330 U.S. 855 (1947).

Since there is no evidence that due process cannot be afforded pursuant to the statute, facial constitutionality in this regard is not obviated. As the Court noted in United States v. Five Gambling Devices, etc., 346 U.S. 441 (1954), a statute should be construed in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative. See also United States v. Witkovitch, 353 U.S. 194 (1957); Driscoll v. Edison Light and Power Co., 307 U.S. 104, reh. den. 307 U.S. 650 (1939).

It is submitted that even the court-announced standard considered in the context of the criminal statute, gives adequate notice and fair warning of the conduct which it prohibits. Cf Bouie v. City of Columbia, 378 U.S. 347 (1964); Wright v. Georgia, 373 U.S. 284 (1963); conformed to, 219 Ga. 125.

3. The residency requirement is not an unconstitutional limitation.

None of the Appellants reside outside of Georgia and thus they have no standing to challenge this portion of the statute. Flast v. Cohen, 392 U.S. 83 (1968). In addition, they fail to show that it is not reasonably related to a legitimate State interest. A restriction in whether a non-resident may obtain an abortion in Georgia is related, first of all, to their own health and safety. Complications arising after the procedure is accomplished and she returns to her home out-of-state are out of the reach of medical treatment by the physician who performed the procedure. Secondly, the State is vitally interested in containing and controlling the number and quality of abortions performed in the hospital which must provide care for enumerable other residents who need it.

The right of a pregnant woman to travel is not thereby infringed in any way. Her movement is not burdened or restricted one iota by this requirement, and she is as free to come and go throughout Georgia as though she were not seeking a termination of pregnancy. Moreover, more is involved here than merely a "medical service". The destruction of another entity casts abortion in an entirely different light.

4. None of the claims asserted are here cognizable.

As to the remaining complaints regarding the procedure, equal protection, and the "right" of physicians, it is submitted that Appellants have advanced nothing which might render the statute unconstitutional on its face. Whether the statute might operate to deprive anyone of a constitutional right or be applied in an unconstitutional manner, is not here at issue. Nor do any of the Appellants present a situation which gives them standing to advance these blanket complaints. Therefore, there is no justiciable controversy or cognizable complaint in these regards.

Moreover, it is submitted that even if the issues had been properly raised, abstnetion would be appropriate in this case involving the construction of a state criminal statute. Appellants have, and had, available to them the state court forum, and determination of the many issues here raised in that arena may very well avoid any necessity for a consideration of serious constitutional proportions. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Louisiana Power & Light Co.

v. City of Thibodaux, 360 U.S. 25 (1959); Alabama Public Service Commission v. Southern Railway, 341 U.S. 363 (1951).

CONCLUSION

The General Assembly of Georgia has enacted and updated the criminal abortion statute. The declaration of what shall be offenses against the State's laws is peculiarly within the power of each state of the union, except only as its authority is limited by the Constitution of the United States. Ex parte Reggel, 114 U.S. 642 (1885). The responsibility for defining and prosecuting crimes is the principle responsibility of the states. Abbate v. United States, 359 U.S. 187 (1959). Appellants have not shown here, nor in the court below, that the statute or any of its parts must be declared unconstitutional facially.

Moreover, the questions put by Appellants are not ripe for determination. As clearly put by this Court in Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969), it will not decide abstract, hypothetical, or contingent questions or any constitutional question in advance of the necessity for its decision. See also, United States v. Raines, 362 U.S. 17 (1960); International Longshoreman's & Warehouseman's Union v. Boyd, 347 U.S. 222, 224 (1954).

Consequently, Appellees respectfully submit that the decision and judgment below should be reversed and remanded for dismissal, for lack of jurisdiction below, or alternatively, that the underlying right of the state to restrict abortions as Georgia has done by the laws of 1968, be established.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dorothy T. Beasley, Attorney of Record for the Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served the foregoing Brief for Appellees on the Appellants by depositing copies of the same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office addresses:

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APPENDIX "A"
FOREWORD
OPINIONS OF THE ATTORNEY GENERAL, 1970

"It is the duty of the Attorney General, when required to do so by the Governor, to give his opinion in writing on any question of law connected with the interest of the State or with the duties of any of its departments. Ga. Code Ann. § 40-1602 Par. 1.

To avoid requiring the Governor to endorse requests for opinions originating with the departments of the State, the Attorney General receives such requests directly from the department heads.

Opinions rendered to the Governor and to the heads of departments are classified as 'official opinions.'

In addition to 'official opinions,' the office of the Attorney General renders 'unofficial opinions' to other state officers (e.g. legislators, district attorneys) and to county and municipal attorneys on questions involving the general laws of the State.

Each 'unofficial opinion' bears the following notation: 'The views expressed herein are the completely unofficial views of the writer only, and should be considered as information only.'"

APPENDIX "B"
GA. LAWS 1876, p. 113

An Act to prevent and punish fœticide or criminal abortion in the State of Georgia.

Section I. Be it enacted, etc., That from and after the passage of this Act, the wilful killing of an unborn child, so far developed as to be ordinarily called "quick," by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be guilty of a felony, and punishable by death or imprisonment for life, as the jury trying the case may recommend.

Sec. II. Be it further enacted, That every person who shall administer to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or mother be thereby produced, be declared guilty of an assault with intent to murder.

Sec. III. Be it further enacted, That any person who shall wilfully administer to any pregnant woman any medicine, drug or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to procure the miscarriage or abortion of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished as prescribed in section 4310 of the Revised Code of Georgia.

Sec. IV. Repeals conflicting laws.

Approved February 25, 1876.